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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 545

GRAIN ELEVATOR, FLOUR AND FEED MILL WORKERS, INTERNATIONAL LONGSHOREMEN ASSOCIATION, LOCAL 418, AFL-CIO, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY MEMORANDUM FOR PETITIONER

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In its Brief in Opposition the Board takes pains to suggest that the judgment below is based on "the particular circumstances of this case" (Opp. p. 2), that the factual situation in this case is "rather unusual" (Opp.

p. 7) and the facts "special" (Opp. p. 11). This is a normal and often appropriate technique in briefs in Opposition, since in determining whether *certiorari* should be granted it is a weighty consideration whether the question is likely to arise again. In the particular circumstances of *this* case, however, the argument will not serve, because the Court below expressly rested judgment on its understanding that the Board had "evolved *a general requirement* in terms of likelihood of providing adequate notice, intending it to apply without regard to whether the particular case reflected actual notice provided in some other way." (Pet. p. 13a, emphasis supplied). And the Brief in Opposition here acknowledges that the Board has required "that picketing—which clearly identifies the primary employer—be the mode of notification." (Opp. p. 8, n. 4). The "general requirement" the Board has evolved applies to all common situs situations (see Opp. pp. 7-9), whose "incidence", this Court has recognized, "is extensive," *Electrical Workers* v. *Labor Board, (General Electric)* 366 U.S. 667, 671; it prohibits even appeals which only urge the neutral employees to withhold their services in aid of the struck employer's everyday operations, although these have been held to be lawful primary strike activity. *General Electric, supra* at 681; *Steelworkers* v. *Labor Board, (Carrier)*, 376 U.S. 492, 499. The present case is "unusual" only in its result.

The Board acknowledges (Opp. p. 9) that *General Electric* and *Carrier* held that it is a normal goal of a primary strike to attempt to halt the day-to-day operations of the struck employer. But it attempts to distinguish those decisions on the ground that neither

"dealt with a situation like that here, where the appeals to the neutral employees were made by their own union, which was not involved in the primary dispute; those appeals occurred at the premises of the neutral employer; and, although the situs of the primary dispute was temporarily there, there was no picketing which clearly marked the primary employer as the target of the dispute." (Opp. p. 10). None of the purported differences is valid; nor has this Court ever approved these purported limitations on its clear holdings in *General Electric* and *Carrier*.

Since, as this Court held in *Houston Contractors Association* v. *Labor Board*, 386 U.S. 664, liability under § 8(b)(4)(B) depends on the means and objectives of the union, and not on its identity, nothing can turn on the fact that the appeals herein were made by the neutral employees' own union. The Board points out that unlike the union in *Houston Contractors* "the petitioner induced the employees of a *neutral* employer, thereby involving that employer in a dispute not his own."[1] (Opp. p. 11) But when the Board proposed to this Court the interpretation of § 8(b)(4)(B) which prevailed in *Houston*, it advanced no such qualification. On the contrary, the Board expressly relied on *Milwaukee Plywood Corporation* v. *N.L.R.B.*, 285

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[1] Since the neutral employers were induced only to engage in lawful primary strike activities as defined in *General Electric* and *Carrier*, the appeal did not involve a neutral in "a dispute not his own." Insofar as the Board points to the source of the appeals to distinguish *General Electric* and *Carrier*, and then to the nature of the appeals to distinguish *Houston Contractors*, its argument is, of course, circular.

F. 2d 325 (C.A. 7)[2] a case in which the "secondary union," had induced the employees of a neutral employer, and the action was held lawful. In *Milwaukee Plywood,* the Board itself said: "The fact that one labor organization rather than another is engaging in allegedly unlawful conduct does not afford a basis to resolve the issue of legality." 126 NLRB 650, 651. That the Board should now seek to reopen the question which this Court settled at the Board's insistence as recently as last April, adds to the propriety of granting review. Surely the rule must be the same whether the Board decides to follow it—as in all prior cases—, or to ignore it—as in this case.

Nor can *General Electric* and *Carrier* be distinguished on the ground that the appeals here occurred at the premises of the neutral employer. This was likewise true in *Carrier,* but the Court regarded the fact to be of "little, if any significance." 376 U.S. at 500.

> "The railroad gate adjoined company property and was in fact the railroad entrance gate to the Carrier plant. For the purposes of § 8(b)(4) picketing at a situs so proximate and related to the employer's day-to-day operations is no more illegal than if it had occurred at a gate owned by Carrier." *Id.*

Here the primary situs of the dispute was the ship of the primary employer. When that ship docked at the premises of the neutral employer, the situs of this dispute was at least equally proximate and related to

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[2] Indeed, the Board's own Petition for Certiorari in *Houston* was based on a conflict with the Seventh Circuit's decision in *Milwaukee Plywood.* Petition for Certiorari, No. 413, October Term, 1966, p. 9.

the employer's day-to-day operations as that in *Carrier:* indeed there was no closer place at which the appeals could have been made.[3]

Of the matters assigned to escape the holding of *General Electric* and *Carrier* there thus remains only the fact that there was no picketing. And it is the Board's holding that liability under section 8(b)(4)(B) can be based on the *absence* of picketing, which is at the heart of this case. The Brief in Opposition does not deny that this is a startling innovation in the law of secondary boycotts, nor does it explain why the Board should require "as it has, that picketing which clearly identifies the primary employer be the mode of notification." (Opp. p. 8, n. 4).[4] Most significantly, however, for present purposes, the Board does not dispute our analysis of the adverse consequences of its rule and their importance on the administration of the Act. Rather the Board seeks to avoid review by claiming that the case rests on its special facts—contrary not only to the express reliance below on a "general requirement" of the Board, but also to its acknowledgment here that it has created a rule to be applied in all such cases.

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[3] The location was identical to that of the appeals which were held lawful in the leading *Moore Dry Dock* case, 92 NLRB 547, in which the proximity test originated, and in *Seafarers' Int'l Union* v. *N.L.R.B.*, 265 F. 2d 585 (C.A.D.C.) Accordingly, the Board's observation that the Court in *Carrier* declined to give an advisory opinion as to the legality of appeals "remote from the struck employer's premises" (Opp. p. 10) is purely diversionary.

[4] The Board advisedly declines to adopt the Court of Appeals' statutory analysis, for the Court's reading of the proviso to § 8(b)(4)(B) only compounds the chaos wrought in the law of secondary boycotts by this case, and the necessity that this Court restore the order established by its prior decisions.

While relying on the holding below that the Board (and any other agency) "could properly adopt a rule * * * and avoid a doctrine that would require it to determine in each case" whether obedience to the rule is necessary to accomplish the statutory end, (Opp. p. 8 n. 4), the Brief in Opposition fails even to acknowledge the existence of the second question presented by our Petition, which challenges this judicial imputation of broad legislative power to administrative agencies. A judgment based on a proposition so fundamentally inconsistent with the primary purpose of judicial review—to preserve the rule of law in administrative proceedings—plainly warrants the attention of this Court.

Respectfully submitted,

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